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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/998,661

12/03/2001

Todd Charles McNeel

0914-1412-DV2

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06/28/2005

EXAMINER

MADSEN, ROBERT A

ROTHWELL, FIGG, ERNST & MANBECK, P.C.

1425 K STREET, N.W.

SUITE 800

WASHINGTON, DC 20005

ART UNIT

PAPER NUMBER

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Please find below and/or attached an Office communication concerning this application or proceeding.



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APPLICATION NO./ CONTROL NO.	FILING DATE	FIRST NAMED INVENTOR / PATENT IN REEXAMINATION	ATTORNEY DOCKET NO.
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EXAMINER

ART UNIT	PAPER
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06172005

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Commissioner for Patents

As ordered by the Board of Patent Appeals and Interferences, the substitute Appeal Brief filed June 9, 2005 has been considered, the Examiner's Answer mailed December 2, 2004 has been vacated, and a new Examiner's Answer has been issued in response to the Appeal Brief filed June 9, 2005.

Robert Madsen 
Examiner
Art Unit 1761



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/998,661
Filing Date: December 03, 2001
Appellant(s): MCNEEL ET AL.

MAILED

JUN 28 2005

GROUP 1700

Richard Wydeven
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 9, 2005 appealing from the Office action mailed June 2, 2004.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

4,122,198	Wisdom et al.	10-1978
4,052,838	Hilton et al.	10-1977
5,298,274	Khalsa	3-1994
3,520,248	MacKendrick	7-1970

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

(10) Response to Argument

In response to Appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to Appellant's argument that there is no suggestion to combine the references and the references do not suggest, the examiner recognizes that

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obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

In this case, Wisdom et al. teach the general method of forming shaped tortilla chips wherein the chips are cut from a sheet of masa, preformed in molds, removed from the mold, and maintain a uniform shape in order to facilitate packing in a stacked arrangement (e.g. Column 2, lines 13-55). Wisdom et al differ from the pending claims in teaching (1) the particular chip shape (2) the particular method of frying/baking : the dough is held in the molds *during* frying or baking, such that the base edges and apex corners of successive tortilla chips are in alternating orientation in the mold.

Hilton et al. also teach a method of forming uniformly shaped potato and corn-based dough chips in a manner that facilitates subsequent packaging in a stacked arrangement. Unlike Wisdom et al., Hilton et al. teach a molding step completed during the frying of the corn dough-based products. Hilton et al. do provide motivation for modifying the fry step of Wisdom in that Hilton et al. attempts to solve the same problem as Wisdom et al (i.e. forming uniform chips for stackability) and offers the advantage of eliminating the separate molding step by combining both molding (i.e. restraining) and frying.

With respect to Khalsa, it was notoriously well known, as evidenced by the references cited (e.g. Hilton et al. teach corn based chips are shaped to fit into cylindrical canister and Wisdom et al. teach pieces that are 5 by 6 inch rectangles) that fried tortilla chips are produced in a variety of shapes. Khalsa is relied on as evidence of the conventionality of producing fried tortilla chips in a triangular shape. Should one elect to form a triangular shape, Khalsa teaches the method of cutting the dough for triangular tortilla shapes involves producing multiple triangles wherein the base edges and apex corners of successive tortilla chips are in alternating orientation (Illustrated by item 70 of Figure 2 in light of Figure 3, and explained in Column 5, lines 32-47).

Selecting any particular conventional shaped, absent any persuasive evidence that Appellant's triangular shape is significant, would have been an obvious matter of choice.

Regarding MacKendrick, MacKendrick also teach a method of frying chips in molds to provide uniformly shaped chips. However, MacKendrick teaches that one obtains the uniformly shaped chips by frying the dough in the molds that match the *cutting pattern* of the dough. Thus, in order to achieve the stackability desired by Wisdom et al., one of ordinary skill in the art would recognize that a frying the dough in molds that match the cutting pattern would provide *uniform* chips to facilitate subsequent packaging in a stacked arrangement. Thus, MacKendrick provides motivation for further modifying the fry step of Wisdom in that MacKendrick teaches when frying the chips in the mold, the mold should match the cutting pattern of the dough (i.e. the base edges and apex corners of successive tortilla chips are in alternating orientation for the triangle shapes of Khalsa) to obtain uniformly shaped fried

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chips, and *uniform* chips would facilitate subsequent packaging in a stacked arrangement.

Appellant argues that selecting a triangular shaped chip would not have been an obvious choice because triangular shaped chips were not conventionally stacked chips, and that Appellant is the first to disclose a method of producing stackable triangular chips. However, the primary reference, Wisdom et al., teach producing stackable uniformly shaped chips (Column 2, lines 52-55) and teaches rectangular shapes (e.g. Column 4, lines 12-37). If it is possible to produce a uniform stackable rectangular (e.g. Wisdom) or even circular/saddle shaped chip (e.g. Hilton), absent any showing of the contrary, one would expect it possible to produce a uniform triangle shape, especially since Hilton et al. teach molding the dough during frying achieves a uniform shape and MacKendrick teaches such molds matching the cutting pattern of the dough will assure a uniform shape. Thus, the art taken as a whole provides steps for obtaining uniformly shaped tortilla chips, and Khalsa teaches a conventional shape for tortilla chips is triangular and illustrates the cutting pattern associated with triangular shaped chips (i.e. the base edges and apex corners of successive tortilla chips are in alternating orientation).

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Robert Madsen *Ram*
Examiner
Art Unit 1761

RAM
June 17, 2005

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